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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LUIS BAUTISTA, MARGARITA GUERRERO, and those similarly situated; Plaintiffs, v. CARL KARCHER ENTERPISES, LLC, CARL'S JR. RESTAURANTS, LLC; Defendants.	**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER** Dept: 311 Judge: Hon. John Shepard Wiley, Jr. Complaint Filed: February 8, 2017

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I. INTRODUCTION

This case is about anticompetitive practices in the labor market for restaurant-based managers of Carl's Jr.[1] restaurants across California. These workers have developed specialized skills and expertise in the Carl's Jr. brand, Complaint ("Compl.") at ¶¶ 96-98, and yet they toil under wages set at or near the minimum, brutal working conditions, and unbearable scheduling practices that force them to come into work at the last minute, cancelling family plans and forcing them to scramble to make new arrangements. Compl. at ¶¶ 31-39. Notwithstanding their skills and expertise, they have little bargaining power because Defendants have inserted into their franchise agreements with franchisees a prohibition against hiring restaurant-based managers from other franchisees or corporate-owned stores. Compl. at ¶¶ at 47-53. That prohibition effectively eliminates competition for the skills and expertise of Carl's Jr. restaurant-based managers. Compl. at ¶ 58.

Defendants point to no legitimate justification for this arrangement, and yet they argue that the Court should dismiss Plaintiffs' claims in part because Plaintiffs' grievances about their wages and working conditions are "the type typically raised directly with one's employer and not the type of complaint to be addressed by the antitrust laws." Defendants' Memorandum of Points and Authorities in Support of their Demurrer to Plaintiffs' Class Action Complaint ("Def. Mem.") at 7.

Defendants ignore that the antitrust laws provide a powerful and increasingly important tool for employees to ensure that labor markets, like other markets, are competitive, and not

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[1] Named as defendants are Carl Karcher Enterpises, LLC, and Carl's Jr. Restaurants, LLC, which are collectively referred to herein as "Defendants" or "Carl's Jr.," and are the franchisor of "Carl's Jr."-branded restaurants in California and elsewhere.

rigged against workers. Regulators, public enforcement officials, and scholars have expressed a "growing concern about . . . a general reduction in competition among firms, shifting the balance of bargaining power towards employers."[2] According to some, "[s]uch a shift could explain not only the redistribution of revenues from worker wages to managerial earnings and profits, but also the rising disparity in pay among workers with similar skills." CEA Monopsony Br. at 1.

Indeed, recent academic attention has focused specifically on the same sort of anticompetitive conduct that is at the heart of this case—no-hire clauses in franchise agreements.[3] That research suggests that these restraints might exert powerful downward pressure on wages for employees of franchisees and that these harms might be particularly acute in the fast-food labor market. *Employer Collusion in Franchise Sector* at 10-16.

Increasingly, the labor market for low-wage workers is not free. In this case, Plaintiffs seek to strike back against that trend.

II. ARGUMENT

A. The Complaint Plainly Alleges a "Contract or Agreement"

Defendants contend, first, that the Complaint should be dismissed because "Plaintiffs fail to allege facts sufficient to demonstrate the existence of any agreement at all." Def. Mem. at 2. In antitrust cases alleging naked agreements in restraint of trade, defendants frequently argue that

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[2] Council of Economic Advisers, Issue Br., *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, Oct. 2016, *available at* https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf ("CEA Monopsony Br."); *see also* DOJ & FTC, Antitrust Guidance for Human Resources Professionals, Oct. 2016, *available at* https://www.justice.gov/atr/file/903511/download ("DOJ/FTC Guidance"); *id.* at 3-4 (summarizing DOJ enforcement efforts).

[3] *See* Alan B. Krueger and Orley Ashenfelter, *Theory and Evidence of Employer Collusion in the Franchise Sector*, Nat. Bureau of Econ. Research Conference Paper, July 18, 2017, *available at* http://conference.nber.org/confer//2017/SI2017/LS/Krueger_Ashenfelter.pdf ("*Employer Collusion in Franchise Sector*").

the plaintiffs have alleged insufficient circumstantial evidence of an agreement to withstand a demurrer. *Bell Atlantic Corp. v. Twombly*, (2007) 550 U.S. 544, 554. It is rare, after all, for competitors to explicitly and openly enter into an agreement not to compete.

This, however, is not like most cases, and Defendants' reliance on this argument is misplaced. Here, Plaintiffs allege that Defendants and their franchisees entered into an express, written agreement not to hire each other's workers. Compl. at ¶¶ 2, 48-52. Thus, the evidence of an agreement here goes well beyond what was sufficient to state a claim concerning purported no-poach agreements among Silicon Valley executives, which were reflected in email communications. *Compare, e.g., In re Animation Workers Antitrust Litig.* (N.D. Cal. 2015) 123 F. Supp. 3d 1175, 1182. The agreement here appears on the face of the written "Preliminary Agreements" that potential franchisees must sign before obtaining a Carl's Jr. franchise, *id.* at ¶ 50, and is part of the franchise agreements that franchisees enter with Carl's Jr at the beginning of the franchisee relationship, *id.* at ¶ 52. There can be no dispute that Plaintiffs have alleged an agreement among Defendants and franchisees, including the franchisees that employed Plaintiffs.

B. <u>The Franchise Structure Does Not Insulate Defendants from Antitrust Claims.</u>

Defendants also argue that they could not have entered into an agreement with franchisees in violation of the Cartwright Act because they and the franchisees are part of a single enterprise. Def. Mem. at 3. For support, they rely on a federal district court opinion from 25 years ago. *Williams v. I.B. Fisher Nevada* (D. Nev. 1992) 794 F. Supp. 1026. That case involved a similar no-hire agreement among Jack-in-the-Box franchisees "whereby the parties agree[d] not to offer employment to a manager of another Jack-in-the-Box within six months of termination from employment at a previous restaurant without a written waiver from the previous owner." *Id.* at 1029. The plaintiff was a manager affected by the agreement who brought federal Sherman Act claims against his employer. The court granted summary judgment

to the employer, reasoning that the owners of Jack-in-the-Box restaurants were part of a single enterprise incapable of conspiring with itself. *Id.* at 1032.

That case is inapposite here for three reasons. First, in *Williams* the court explained that the cornerstone of the single-entity analysis was "competition between entities," and concluded that Jack-in-the-Box had done "everything in its power to minimize competition and promote uniformity between franchisees." *Id.* By contrast, CKE's former CEO has explained that

> [Carl's Jr.] franchisees choose their restaurant's location, determine how much they will pay for the location, invest their own capital in facilities and equipment, choose the prices they charge for products and manage every aspect of their restaurants day to day operations . . . Our franchisees are not a division, subsidiary or alter ego of CKE, but are truly independent small businessmen and businesswomen who know how to drive their own business.

Compl. at ¶ 40. Carl's Jr. franchisees are particularly distinct in their employment of restaurant workers. *Id.* at ¶ 41. It seems, therefore, that even under *Williams*'s framework, Plaintiffs' claims should survive demurrer.

Second, *Williams* resolved claims under the Sherman Antitrust Act; it did not address the scope of the Cartwright Act. The California Supreme Court has explained that "interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." *In re Cipro Cases I & II*, (2015) 61 Cal. 4th 116, 142. To be sure, like claims under the Sherman Act, claims under the Cartwright Act must allege "concerted action by separate entities." *G.H.I.I. v. MTS, Inc.* (Ct. App. 1983) 147 Cal. App. 3d 256, 266. But when applying this principle, California courts have set a high bar for establishing that distinct corporate entities are part of a single entity incapable of conspiring with itself. Indeed, the California Supreme Court has concluded in other contexts that parties to franchise agreements can engage in concerted conduct in violation of the

Cartwright Act even if the parties may be considered a "type of joint enterprise." *Mailand v. Burckle* (1978) 20 Cal. 3d 367, 378.

Third, intervening U.S. Supreme Court precedent suggests that *Williams* is no longer good law, even for the purposes of interpreting the Sherman Act. In *Williams*, the court concluded that the franchisees could not conspire with each other because of substantial cooperation between them in marketing the Jack-in-the-Box brand. 794 F. Supp. 1029-32. But in *American Needle v. National Football League*, (2010) 560 U.S. 183, Justice Stevens, writing for the Supreme Court nearly a decade after *Williams*, explained that "the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved 'seem' like one firm or multiple firms in any metaphysical sense. The key is whether the alleged 'contract, combination . . . , or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers." *Id.* at 195. Applying that framework, the Court concluded that NFL franchises "do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action." *Id.* at 196.

Like the NFL franchises in *American Needle*, the Carl's Jr. franchisees in this case are distinct entities, both in terms of decisionmaking and economic power. Perhaps because of its desire to disclaim joint employer status, Carl's Jr.'s public disclosures and agreements emphasize that franchisees operate separately from each other and from CKE. Those documents make expressly clear that no franchise shall hold itself out as "agent, . . . partner, subsidiary, [or] joint venturer" of Carl's Jr. Compl. at ¶ 43.

Thus, even under the framework applied by the court in *Williams*, the parties to the no-hire agreement are sufficiently distinct to trigger application of the antitrust laws to their concerted conduct. Certainly, under the Cartwright Act or under the Sherman Act as applied post-*American Needle*, Plaintiffs sufficiently plead that Defendants have entered into an

agreement between distinct economic entities.

C. Plaintiffs Have Standing to Sue under the Cartwright Act

Defendants also argue that Plaintiffs do not have standing to sue under the Cartwright Act because they have not alleged that they were injured because of Defendants' conduct. Cal. Bus. & Prof. Code § 16750(a) (private litigant must be "injured in his or her business or property by reason of anything forbidden or declared unlawful by [the Cartwright Act]"); *see Vinci v. Waste Mgmt., Inc.* (1995) 36 Cal. App. 4th 1811, 1814.

To plead standing under the Cartwright Act, a plaintiff must merely allege "the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful." *Marsh v. Anesthesia Service Medical Group, Inc.* (2011) 200 Cal. App. 4th 480, 495; *see also* Cal. Bus. & Prof. Code § 16750(a) (private litigant must be "injured in his or her business or property by reason of anything forbidden or declared unlawful by [the Cartwright Act]").

Here, Defendants contend that Plaintiffs have alleged nothing more than everyday workplace grievances, and have not alleged damages arising from anticompetitive conduct. But Defendants are missing the point. Plaintiffs do not bring this case merely as "employees" against their employer complaining about working conditions—they bring this claim as suppliers against the ringleader of a horizontal conspiracy among purchasers (of labor). The alleged wrong is exactly what the antitrust laws were designed to prevent. After all, it is a fundamental premise of the antitrust laws that competition between employers places upward pressure on wages and working conditions. DOJ/FTC Guidance at 2 ("[C]ompetition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment."); *see also Vinci*, 36 Cal. App. 4th at 1814 (injury is one that the antitrust laws are designed to protect against). And without competitive forces in the labor market, employers have less incentive to

pay their workers more or to treat them better.

Defendants' standing argument has been rejected in antitrust cases alleging anti-competitive employment practices. *See In re High-Tech Employee Antitrust Litig.*, (N.D. Cal. 2012) 856 F. Supp. 2d 1103, 1123 (dismissing argument that high-tech workers had not sufficiently alleged antitrust standing in no-poach case involving Silicon Valley workers). As noted by that court, workers are injured by anticompetitive conduct when "an employee is the direct and intended object of an employer's anticompetitive conduct." *Id.* (citing *Ostrofe v. H.S. Crocker Co., Inc.* (9th Cir. 1984) 740 F.2d 739, 742-43.

In this case, Plaintiffs allege that the no-hire agreement removed competition between and among Carl's Jr. franchisees and Defendants in the employment of restaurant-based managers. *Vinci v. Waste Mgmt., Inc.*, 36 Cal. App. 4th at 1814 (Carwright Act plaintiff must plead "the existence of an antitrust violation with resulting harm to the plaintiff"). The no-hire agreement thus caused harm to workers in the labor market for restaurant-based Carl's Jr. managers in California by reducing competition for those workers. Compl. at ¶¶ 2, 7, 80, 108; *see also Vinci*, 36 Cal. App. 4th at 1814 (direct causal relationship between restraint and injury and an injury that the antitrust laws are designed to protect against). Plaintiffs worked in this labor market and experienced direct harm from the restraint on competition in the form of reduced wages, unpredictable schedules, and poor working conditions. Compl. at ¶ 108; *see also Vinci*, 36 Cal. App. 4th at 1814 (the absence of more direct victims and double recovery).

Further, it makes no difference that Plaintiffs have not alleged that they ever tried to switch to a different restaurant. As an initial matter, Plaintiffs have alleged that it is "common knowledge" among restaurant-based managers that they cannot transfer between Carl's Jr. restaurant owners. Compl. at ¶ 58. So for most workers affected by the "no hire" agreement, it would never be worth attempting to transfer to another franchisee.

But Plaintiffs could allege Cartwright Act claims even if they were entirely oblivious to the no-hire agreement and nonetheless never sought a transfer to improve their working conditions. The law is clear that to state an antitrust claim a plaintiff need not allege that competitors ***actually*** competed in a specific market, *Palmer v. BRG of Georgia, Inc*., (1990) 498 U.S. 46, 49-50; it is enough that they have agreed not to compete. Similarly, in this case, Plaintiffs need not allege that competing franchisees actually competed over either of the Plaintiffs. Plaintiffs also need not allege that they sought work for another restaurant or even that they would have preferred to work at another restaurant. Rather, it is enough to allege that competitors agreed with each other not to compete for restaurant-based managers and that as restaurant-based managers, Plaintiffs were injured by this harm to competition.

Finally, in support of their standing arguments, Defendants point to several cases where courts have held that employees do not have antitrust standing to allege Cartwright Act claims against their employers. Def. Mem. at 7-8 (citing *Silguero v. Creteguard, Inc.*, (2010) 187 Cal. App. 4th 60, and *Vinci*, 36 Cal. App. 4th 1811). Those cases reveal Defendants' confusion about the nature of the claims against them here. Plaintiffs do not challenge consumer-oriented anticompetitive conduct like price fixing more appropriately addressed through Cartwright Act claims brought by consumers or competitors. *Vinci*, 36 Cal. App. 4th 1811. Nor do Plaintiffs challenge a termination that can be addressed through unlawful termination claims. *Silguero v. Creteguard, Inc.*, 187 Cal. App. 4th 60. Rather, they allege an agreement among horizontal competitors to restrain competition–which is the prototype of an antitrust claim. The employer is only one of many of these horizontal competitors who should be competing for the labor of restaurant-based CKE managers. And Plaintiffs allege anticompetitive harm to wages and working conditions that can only be addressed through antitrust claims.

D. Plaintiffs Have Standing to Sue under the UCL

Defendants also argue that Plaintiffs do not have standing to assert claims under California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200. Def. Mem. at 8-9. To have standing to assert claims under the UCL, a plaintiff must have "suffered injury in fact and . . . lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204.

Plaintiffs have easily pled UCL standing here. They allege (1) that Defendants participated in an illegal restraint of trade that limited competition for restaurant-based CKE managers, Compl. at ¶¶ 2, 47-51; (2) that Plaintiffs worked as restaurant-based CKE managers, Compl. at ¶¶ 19-32; and (3) that the alleged restraint caused Plaintiffs to lose money or property by suppressing their wages and worsening their working conditions, Compl. at ¶ 7. *See Kwikset Corp. v. Superior Court,* (2011) 51 Cal. 4th 310, 327.

Defendants further argue that Plaintiffs do not have standing to assert UCL claims because they are not able to seek restitution for the alleged UCL violations. As the California Supreme Court has cautioned, however, "[t]he concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person." *Korea Supply Co. v. Lockheed Martin Corp*., (2003) 29 Cal. 4th 1134, 1149.

And even if the Court concludes that Plaintiffs cannot seek monetary restitution, that is not dispositive of the standing analysis. Plaintiffs also seek injunctive relief under the UCL, which is available to them whether or not Defendants deprived them of a vested monetary interest. *In re High-Tech Employee Antitrust Litig*., 856 F. Supp. 2d at 1124-26. As the California Supreme Court has explained, to make "standing under section 17204 dependent on eligibility for restitution under section 17203 would turn the remedial scheme of the UCL on its head." *Kwikset Corp. v. Superior Court* (2011) 51 Cal. 4th at 337.

E. Plaintiffs May Assert a Claim under Section 16600

Finally, Defendants also argue that Plaintiffs' claim under Cal. Bus. & Prof. Code § 16600, which voids contracts that "restrain[] anyone from engaging in a lawful profession, trade, or business," must be dismissed because the provision does not provide a private cause of action. Def. Mem. at 9.

Defendants cannot cite any case law in support of this argument. Because of the important public policy interest in preserving a competitive labor market for California workers, California courts have on several occasions allowed both workers and employers to bring actions seeking declaratory or injunctive relief under § 16600. *See, e.g.*, *Robinson v. U-Haul Co. of California*, (2016) 4 Cal. App. 5th 304, 316; *LeFebvre v. Syngenta Biotechnology*, Inc., (N.D. Cal. Dec. 15, 2008) No. C 08-02732 JW, 2008 WL 5245056, at *3. Plaintiffs here seek similar relief, and the Court should allow their claims under § 16600 to proceed.

III. CONCLUSION

For all these reasons, the Court should deny Defendants' demurrer in full.

Dated: September 5, 2017

Respectfully submitted,

TOWARDS JUSTICE

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